NO. 80-1557

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARION CHARLES BUCHANAN, SR.,
Petitioner

VERSUS

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CECIL BURGLASS, JR.

2111 Dauphine Street
New Orleans, Louisiana
70116
(504) 949-7932

ATTORNEY FOR MARION CHARLES BUCHANAN, SR.
Defendant - Appellant

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

I.

Did the Fifth Circuit err in failing to suppress evidence, the fruit of an unlawful, warrantless search? The Court's basis for refusing to reach the merits of the defendant's contention is that defendant had a terminated property interest in leased premises, because he was behind in the payment of rent, causing the lease to expire by its own terms. Such a find is contrary to Louisiana law. Articles 4701, et seq., Louisiana Code of Civil Procedure; *Bunel of New Orleans, Inc. v. Cigali,* La. App., 1977, 348 So. 2d 993, 995, Writ refused 350 So.2d 1210.

Did the Fifth Circuit err in affirming a mail fraud conviction of a failed fraud, where the mailing was not only not incidental to the scheme, but rather the very means of its detection?

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Appeal from the United States District Court
for the Western District of Louisiana
Lafayette - Opelousas Division
Criminal Action No. 79-60003-01, before the
Honorable W. Eugene Davis, Judge, and a Jury
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JURISDICTION

This Court has jurisdiction under its supervisory powers to grant writs of certiorari from decisions of the Circuit courts of Appeal in criminal cases, 28 USC 1651.

(a) Buchanan was indicted in the United States District Court, Western District of Louisiana, on two Counts for alleged violations of 18 USC 1341. A jury convicted him on both Counts. The United States Court of Appeals for the Fifth Circuit reversed as to Count I, and affirmed as to Count II.

(b) Judgment requested to be reviewed was rendered December 22, 1980;

(c) Rehearing was denied on January 21, 1981;

(d) Mandate Stayed until March 6, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a) The Fourth Amendment, Constitution of the United States.

b) Articles 4731 and 4732, Louisiana Code of Civil Procedure.

Article 4731 "If the lessee or occupant fails to comply with the notice required to vacate required under this Title; the lessor or owner, or agent thereof, may cause the lessee or occupant to be cited summarily by a court of competent jurisdiction to show cause why he should not be ordered to deliver possession of the premises to the lessor or owner."

Article 4732 "The court shall make the rule returnable not earlier than the third day after service thereof, at which time the court shall try the rule and hear any defense which is made.

If the court finds the lessor or if owner entitled to the relief sought, or id the lessee or occupant fails to answer or to appear at the trial, the court shall render immediately a judgment of eviction ordering the lessee or occupant to deliver possession of the premises to the lessor or owner."

(c) 18 USC 1341, The Mail Fraud Statute.

STATEMENT OF THE FACTS

I.

The defendant, Buchanan, filed a timely pretrial motion to suppress evidence of a warrantless search. Following his indictment, in Lafayette, Louisiana, agents of the Federal Bureau of Investigation were contacted Buchanan's landlord, inviting them to inspect Buchanan's leased premises. Without a warrant, an FBI agent, accompanied by the landlord, entered the leased premises and made a search. Thereafter, a warrant was obtained from a United States Magistrate, and a second more thorough search was made.

About 20 days prior to the initial search, the landlord caused the locks to be changed on the leased premises for alleged non-payment of rent. Buchanan contends the landlord was in violation of the lease for failure to cause renovations of the premises, as provided in the written lease.

II.

On January 31, 1978 Buchanan deposited bogus drafts (checks) in a corporate account at the First National Bank of Lafayette. The Teller testified that the account was immediately credited. Approximately 3 days later, James Kelly, the Executive Vice President of the bank, froze Buchanan's account. At no time did Buchanan successfully withdraw funds from the account. Following the freezing of the funds, Kelly caused a letter of collection to be sent to the Lafayette, Louisiana, bank's corresponding bank in New Orleans. It is this letter mailing which the government alleges constitutes the requisite mailing to satisfy the mail fraud statute.

ARGUMENT

I.

Did the Fifth Circuit Err in Failing To Suppress Evidence, The Fruit Of An Unlawful, Warrantless Search?

The Fifth Circuit Court erred in adopting the Government's argument that Buchanan had abandoned the property by failing to pay rent; and, therefore, he had no property interest in the premises once the lease expired. This Court found that since Buchanan's property interest in the leased premises had expired and snce he was not present at the time of the search, "he had no legitimate expectation of privacy in the premises and thus no standing to challenge the search."

Property rights are established by State law; in this case, the law of the State of Louisiana. *Possession* of property in Louisiana is constructive and the physical presence of a lessee is not necessary for legal possession to exist.

The extra-judicial actions of the Lessor in *locking out* the defendant was illegal. The illegal *lockout* deprived the defendant of access to his leased property, but did not disturb his *right* to the property, or Buchanan's legitimate expectation of privacy in the premises.

This rights continues if the lessee has failed to pay rent. The right exists and continues if the lease expires on its own terms.[2]

Due process is required in Louisiana to evict a tenant. Articles 4701, et seq., Louisiana Code of Civil Procedure. Articles 4731 and 4732 provide the method by which a lessor gains and the lessee loses possession. Until due process occurs, and the court of appropriate jurisdiction rules, the lessee's property right continues.

The Louisiana Court of Appeal, Fourth Circuit,[3] in

2. The lease also provides that the lessor was obligated to perform renovations, which were not accomplished. The defendant's withholding of rent may have been justified.

3. The site of the property involved in the instant case is within the Fourth Circuit Court of Appeal for the State of Louisiana.

in *Bunel of New Orleans, Inc. v. Cigali,* La. App. 1978, 348 So. 2d 993, 995. Writ refused, 350 So. 2d 1210, held:

> "The general rule set forth in the jurisprudence is that a lessor has no right to take possession or in any way disturb the possession of the lessee without first resorting to judicial process. If the lessor wrongfully dispossesses his lessee, he thereby commits a trespass and becomes liable to the lessee in damages.
>
> An exception to the general rule allows the lessor to exercise selfhelp when the lessor has voluntarily abandoned the premises."

Buchanan did not *voluntarily* abandon the premises. The lessor illegally locked him out. Buchanan's property right continued despite the lockout, and that right was alive when the warrantless search occurred.

Buchanan had every personal and legal expectation of privacy as to both the premises and his property within. His Fourth Amendment rights are not being vicariously asserted. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 387 (1978).

And Buchanan had a possessory interest in the premises searched and the property seized. *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93, L.Ed. 59 (1951); *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 797 (1968)

II.

Did the Fifth Circuit Err In Affirming A Mail Fraud Conviction Of A Failed Fraud, Where The Mailing Was Not Only Not Incidental To The Scheme, But Rather The Very Means Of Its Detection?

In its opinion, the Fifth Circuit correctly found that the defendant's conviction on Count I should be reversed, stating:

> "Since the scheme to obtain forbearance of foreclosure on the mortgage ended when Kelly refused to give the sixty-day letter, the mailing could not have been for the purpose of executing that scheme. *United States v. Maze,* 414 U.S. 395, 400, 94 S.Ct. 645, 648, 38 L.Ed. 2d 603, 607 (1974). Like Maze in his case, the defendant here, once Kelly refused to give him the sixty-day letter, probably would have preferred that the check never be mailed. The scheme as planned contemplated mailing, but the scheme as unsuccessfully put into motion did not result in a mailing for the purpose of executing the scheme, as the statute requires."

The Court then found as to CountII :

> "In connection with Count II, Buchanan strenuously argues that he was not given immediate credit for the checks deposited in late January, and that even if he was, the mailing could not further this successful scheme. Buchanan's factual argument is contrary to the testimony of the teller involved, contrary to the implicit finding of the jury, and unsupported by any evidence. Buchanan was given immediate credit on January 31, 1978. *Assuming this fact, he admits the scheme was successful* but he claims the delay caused by the mailing could not further the scheme. This is not so. The mailing would have delayed the discovery of the fraud and would have given Buchanan exactly what his schemes were designed to obtain: time to acquire funds to which he was not then entitled." (Emphasis added)

Apparently, the Court seized upon language from Fifth Circuit defendant's brief, which led the Court to err. (P. 21)

> "The evidence is absolute that Buchanan's corporate account had been frozen and he was denied immediate credit on funds deposited in the account."

The Fifth Circuit is correct that the Bank Teller who on January 31, 1978 accepted Buchanan's deposit of the bogus checks testified he was given immediate credit. Defendant's

Brief erroneously stated that immediate credit was not given. Although immediate credit was granted, on January 31, 1978, two or three days later it was withdrawn. However, the argument that the scheme failed is found throughout the Brief filed for the defendant. The Court affirms the conviction on Count II, having found that the scheme succeeded. In reaching this conclusion the Court erred.

The Court finds that the scheme succeeded because, without requesting immediate credit, Buchanan was in fact credited with the deposit made to his bank account. Perhaps Buchanan could have obtained money orders from the account during the interim between the date of deposit, January 31, 1978 and the date the account was frozen, some two or three days later. Perhaps not, considering John Kelly's aversion to the defendant.

The fact is: Buchanan did not obtain funds during the several days his account remained active. The transaction was handled at the whim of the Teller. The scheme was not triggered (if in fact fully formulated) before February 10, 1978. The scheme, as understood and argued by the government, was that Buchanan would at some point in time turn the deposit of bogus checks into cash or its equivalent *by making a withdrawal from the Lafayette Bank;* not, as the facts establish, by acquiring a credit in a bank account. The acquisition of a credit was only a step of the scheme, which step temporarily succeeded. While the initial *step* may have *temporarily* succeeded, the *scheme* failed.

To succeed the fraudulent scheme required several steps: Buchanan had to receive immediate and *continuing credit,* and he had to withdraw funds. But, this credit was nullified and Buchanan's account *frozen* sometimes in the first three days of February, 1978.[1] The scheme had failed when the account was frozen. On February 10, 1978, Buchanan attempted to withdraw funds from his account. He was advised by the Collection Teller that the account was frozen; that is, no funds in the account could be withdrawn or transferred until the Lafayette Bank received collection on the deposited bogus checks. That day would never come. The scheme had failed, and the February 13, 1978 mailing of a collection letter to the Whitney National Bank in New Orleans could only result in a subsequent notification to the Lafayette bank that the checks were worthless.

In reversing the conviction on Count I, the Court found that the defendant "probably would have preferred that the checks never be mailed." That is also true as to the circumstances of Count II.

On February 10, 1978 the scheme ended in failure. Buchanan knew the scheme to defraud the bank had failed because the collection teller told him the account was frozen. (R. Vol. II, page 48)

As to Count II, the Fifth Circuit should have tracked the

1. This Fifth Circuit so finds in its Opinion.

language it used in dealing with Count I. The following would be consistent therewith:

> Since the scheme to withdraw funds ended when Buchanan's account was frozen and the Bank refused to permit use of the account, the mailing could not have been for the purpose of executing the scheme. *United States v. Maze,* 414 U.S. 395, 400, 94 S.Ct. 645, 648, 38 L.Ed. 2d 603, 607 (1974). Like Maze in this case, the defendant here, once the account was frozen, and inoperative, probably would have preferred that the checks never be mailed. The scheme as planned contemplated mailing, but the scheme as unsuccessfully put into motion did not result in a mailing for the purpose of executing the scheme, as the statutes requires.

Perhaps the Fifth Circuit was mislead by counsel's use of the phrase "immediate credit". However, it is clear that the argument made for the defendant is that the scheme failed and ended on February 10, 1978. The subsequent mailing of the 13th of February was superfluous. "The scheme as unsuccessfully put into motion did not result in a mailing for the purpose of executing the scheme, as the statute requires."

We reiterate: Buchanan required more than immediate credit for the scheme to succeed. He had to use the funds.

The holding of this Court as to Count I is correct and consistent with its findings in *United States v. Knight* 607 F. 2d 1172, 1175 (5th Circuit 1972); following *Kann v. United States,* 323 U.S. 88, 94, 65 S.Ct. 145, 151, and *United States v. Maze,* supra. In *Kann* and *Maze,* the fraudulent schemes ended unsuccessfully before the mailings occurred. That is exactly what happened under the circumstances of Count II.

CONCLUSION

It is respectfully requested that a Writ of Certiorari issue.

Respectfully submitted,

CECIL M. BURGLASS, JR.

2111 Dauphine Street
New Orleans, Louisiana 70116
(504) 949-7932

ATTORNEY FOR MARION CHARLES BUCHANAN, SR.
Defendant - Appellant

CERTIFICATE OF MAILING

This is to certify that I, Cecil M. Burglass, Jr., the Attorney for Defendant-Appellant, Marion Charles Buchanan, Sr., have this day delivered three(3) true and correct copies of the above and foregoing PETITION FOR WRIT OF CERTIORARI on behalf of Defendant - Appellant to counsel for the Plaintiff-Appellee by placing said copies in the United States Mails, postage prepaid, properly addressed as follows:

J. RANDSDELL KEENE
United States Attorney
Western District of Louisiana
3D Floor, Federal Building
United States Courthouse Building
500 Fannin Street
Shreveport, Louisiana 71101

BRIAN P. JOFFROIN
Assistant United States Attorney
Western District of Louisiana
3D Floor, Federal Building
United States Courthouse Building
500 Fannin Street
Shreveport, Louisiana 71101

MARTY STROUD, III
Assistant United States Attorney
Western District of Louisiana
3D Floor, Federal Building
United States Courthouse Building
500 Fannin Street
Shreveport, Louisiana 71101

on this 5th day of March, 1981.

CECIL M. BURGLASS, JR.

United States of America vs.

Defendant: Marion Charles Buchanan, Sr.

United States District Court for Western District of Louisiana Lafayette-Opelousas Division

Docket No. CR-79-60003-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

Counsel

In the presence of the attorney for the government the defendant appeared in person on this date June 22nd, 1979

____ Without Counsel — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

x With Counsel — Mr. Cecil M. Burglass, Jr.

Plea

__Guilty, and the court being satisfied that there is a factual basis for the plea.

__Nolo Contender

x Not Guilty on Counts I and II of the superseding indictment.

Finding and Judgment

____ Not Guilty. Defendant is discharged.

There being a verdict of:

x Guilty, On Counts I and II

Defendant has been convicted as charged of the offense(s) of fraud, in violation of 18 U.S.C. 1341, as charged in the two-count superseding indictment.

And On This 1st Day Of November, 1979,
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted

Sentence or Probation Order

IT IS ADJUDGED that on Count I the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years.

IT IS ADJUDGED that on Count II the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years.

Special Conditions of Probation

Said sentence on Count II to run concurrently with sentence on Count I.

Filed Nov. 2, 1979

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrent and revoke probation for a violation occurring during the probation period.

Commitment	The court orders commitment to the custody of the Attorney General and recommends.
Recommendation	It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY:

_x_ U.S. District Judge

___ U.S. Magistrate

/S/ W. EUGENE DAVIS

W. EUGENE DAVIS 11/1/79

MINUTE BOOK

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

LAFAYETTE – OPELOUSAS DIVISION

FRIDAY JUNE 22ND, 1979

Court met pursuant to adjournment at 10:30 a.m.

PRESENT: HON. W. EUGENE DAVIS, JUDGE, PRESIDING
Ronald G. Weathers, Minute Clerk
Vernon L. Miller, Court Reporter
Steven J. Willis, Crier-Law Clerk
Kathleen A. Manning, Law Clerk
Calvin L. Mouton, Deputy U.S. Marshal
William R. Sayes, U.S. Probation Officer

A STATUS CONFERENCE WAS HELD ON THIS DATE IN THE FOLLOWING CASE:

CIVIL ACTION NO. 74-293 - JOHN F. VINCENT v. HARTFORD ACCIDENT & INDEMNITY COMPANY, ET AL

United States of America
vs. No. 79-60003-01 - Criminal

Marion Charles Buchanan, Sr.

Appearances:
Brian P. Joffrion and
A.M. Stroud, III For Government
Cecil M. Cecil M. Burglass, Jr.
For Deft.

Defendant present with retained counsel for arraignment on superseding indictment.

On arraignment defendant entered a plea of NOT GUILTY on Counts I and II of the superseding indictment.

IT IS ORDERED that the plea of NOT GUILTY on Counts I and II of the superseding indictment to be entered.

IT IS FURTHER ORDERED that defendant is allowed ten (10) days from this date within which to file any motions to the superseding indictment.

IT IS FURTHER ORDERED that counsel for the government furish the Minute Clerk with a copy of the superseding indictment, and that the Minute Clerk furnish copies therof to the defendant and his counsel.

Copies of superseding indictment furnished defendant and his counsel by Minute Clerk.

This case came on for hearing on defendant's motion to supress.

Witnesses sequestered on oral motion of defendant.

Oral testimony adduced on behalf of defendant until 4:00 p.m., at which time defendant rested, subject to his supplementing the evidence by submitting certain documents and the testimony of Mr. Taylor.

IT IS ORDERED that the said motion to supplement the evidence is DENIED.

Documentary evidence filed on behalf of the government.

MINUTE BOOK

CONTINUATION OF MINUTES OF COURT, LAFAYETTE-OPELOUSAS DIVISION, JUNE 22ND, 1979

Continuation of arraignment and hearing on motions in CRIMINAL NO. 79-60003-01 - UNITED STATES OF AMERICA v. MARION CHARLES BUCHANAN, SR.

IT IS FURTHER ORDERED that for reasons orally assigned, defendant's motion to suppress is DENIED.

IT IS FURTHER ORDERED that the oral motion by the government that certain language be struck from defendant's memorandum is DENIED.

*

UNITED STATES OF AMERICA	APPEARANCES:
*	*
vs. No. 79-60011-01 - Criminal	* Brian P. Joffrion and A.M. Stroud, III For Government
Marion Charles Buchanan, Sr.	Cecil M. Burglass, Jr. for Deft.

*

Defendant present with retained counsel.

For reasons orally assigned,

IT IS ORDERED that defendant's motion to dismiss the indictment herein is GRANTED.

AT 4:30 P.M., IT WAS ORDERED THAT COURT BE ADJOURNED. (wed)

MINUTE BOOK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THURSDAY AUGUST 16, 1979

Court met pursuant to adjournment at 9:30 A.M.
PRESENT: HON. W. EUGENE DAVIS, JUDGE, Presiding
Vernon Miller, Court Reporter
Cheryl Curtis, Minute Clerk

United States of America
Versus CR 79-60003-01

Marion Charles Buchanan, Sr.

Appearances:

Brian P. Joffrion & A.M. Stroud, III, for Government
Cecil M. Burglass, Jr. &
EWARD M. BALDWIN, for Defendant

Jury trial resumed.

Oral motions by defendant at close of all evidence re-urging all previous motions, particularly to dismiss indictment as to Counts I and II and judgment of aquittal, submitted, DENIED.

Closing argument made on behalf of all parties.

The jury charged, and at 1:15 P.M., the jury retired for deliberation.

Notes from the Foreperson of the Jury to the Court requesting certain exhibits, filed.

At 2:35 P.M., the jury returned into open court with a verdict finding the defendant, Marion Charles Buchanan, Sr. guilty as charged as to Count I of the indictment and guilty as charged as to Count II of the indictment.

Verdict read aloud by the Court. The jury polled and the verdict was found to be unanimous. Verdict filed.

IT IS ORDERED that this case be referred to the Probation Office for a pre-sentence investigation and report. It was stated by the Court that sentencing will be set at a later date, and that the defendant's bond will be continued.

AT 3:00 P.M., IT WAS ORDERED THAT COURT BE ADJOURNED. (wed.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE - OPELOUSAS DIVISION

Present: Hon. W. Eugene Davis, Judge, Presiding October 10, 1979
Vernon L. Miller, Court Reporter
Ronald G. Weathers, Minute Clerk
Court Opened: 2:00 PM
Court Adjourned: 2:25 PM

MINUTES OF COURT

Case No. 79-60003-01
United States Of America vs. Marion Charles Buchanan, Sr.

APPEARANCES

BRIAN P. JOFFRION FOR GOVERNMENT

CECIL M. BURGLASS, JR. and EDWARD M. BALDWIN FOR DEFENDANT

Case Called For:
_____ Hearing on temporary restraining order
_____ Hearing on mental competency
x Hearing on motions
_____ Jury selection only
_____ Trial by jury, _____ day
_____ Trial without jury, _____ day
_____ Other _____

Filings: D-1 AFFIDAVIT OF MRS. ROSE BUCHANAN

Verdict, Ruling, Comments:
IT IS ORDERED that defendant's motions for judgment of acquittal and for new trial are DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS *DIVISION*
In Lafayette

Present: *Hon.* W. Eugene Davis, *Judge, Presiding* November 1, 1979
Vernon L. Miller, *Court Reporter*
Ronald G. Weathers, *Minute Clerk*
Court Opened: 11:30 AM
Court Adjourned: 12:05 PM

MINUTES OF COURT

Case No. Cr 79-60003-01 ____ Defendant in Custody
Defendant Marion Charles Buchanan, Sr.
Govt. Counsel Brian P. Joffrion
* x Defendant on bond, bond continued
Defense Counsel Edward M. Baldwin
* x Bond set $100,000
____ Bond cancelled
____ Failed to appear, warrant ordered.

---

x *Case called for sentencing*
Ct. (s) I, *Custody* 5 yrs., *Probation* _____, *Fine*
Ct. (s) II, *Custody* 5 yrs., *Probation* _____, *Fine*
Ct. (s) ____, *Custody* _____, *Probation* _____, *Fine*
Ct. (s) ____, *Custody* _____, *Probation* _____, *Fine*

_____ *Suspended imposition of sentence*
_____ *Suspended execution of* _____
_____ *Defendant ordered to report(date, time, place)* _____
_____ *Special conditions of probation* _____
_____
_____ *Recommendations of the Court* _____
_____
_____ *Dismissed counts* _____
x *Defendant advised of right to appeal*

COMMENTS:

SENTENCE ON COUNT II TO RUN CONCURRENTLY WITH SENTENCE ON COUNT I.

ORAL MOTION BY THE GOVERNMENT THAT DEFENDANT'S BOND BE REVOKED, AND THAT A NEW BOND BE SET AT $150,000.

IT IS ORDERED THAT THE SAME BOND THAT IS IN FORCE REMAIN IN EFFECT FOR A PERIOD OF TEN(10) DAYS FROM THIS DATE, AND THAT THE DEFENDANT ARRANGE, BEFORE HE LEAVES THIS COURT TODAY, TO HAVE A TELEGRAM SENT BY THE SURETY ON THE BOND AGREEING TO REMAIN BOUND ON THE BOND PENDING APPEAL.

IT IS FURTHER ORDERED THAT WITHIN TEN (10) DAYS FROM THIS DATE, AN ADDITIONAL $75,000 BOND BE FILED WHICH WOULD MAKE A TOTAL BOND OF $100,000.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Marion Charles BUCHANAN, Sr.,

Defendant–Appellant.

No. 79-5671.

United States Court of Appeals,

Fifth Circuit.

Unit A

Dec. 22, 1980.

Defendant was convicted in the United States District Court for the Western District of Louisiana, W. Eugene Davis, J., on two counts of mail fraud, and he appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) mailing involved in first count was not for purpose of executing defendant's admitted scheme to defraud, but mailing in second count was for such purpose; (2) defendant had no standing to challenge search of rented premises occurring after defendant's lease had expired and when defendant was not present at the premises; and (3) trial court did not abuse its discretion in procedure used in investigating incident in which out-of-court comment made by a government witness was allegedly overheard by two jurors.

Affirmed in part; reversed and remanded in part.

1. Post Office 35(8)

Where defendant presented bad check to his bank to obtain a letter saying that the bank would not foreclose on defendant's property for 60 days but where bank refused to give such letter to defendant, defendant's scheme to defraud failed and

bank's subsequent mailing of the check for collection could not have been for purpose of executing the scheme and thus could not sustain defendant's conviction under federal mail fraud statute 18 U.S.C.A. § 1341.

2. Post Office 35(8)

In light of evidence, in prosecution for mail fraud, that mailing of bad checks, for which defendant had been given immediate credit, was for purpose of buying defendant as much as six months' use of credit obtained in the depositary bank, jury could find that such mailing was clearly a part of defendant's scheme and that the scheme had not been completed when he had been given immediate credit for the checks. 18 U.S.C.A. § 1341.

3. Post Office 48(4)

Indictment in prosecution for mail fraud met requirement of stating that the mailing was for the purpose of executing defendant's scheme to defraud. 18 U.S.C.A. § 1341.

4. Post Office 49(5)

Evidence, in prosecution for mail fraud, introduced to prove defendant's intent was admissible even though defendant, who had pled not guilty, allegedly never made intent an issue; prosecution was under no obligation to wait and see whether defendant would argue nonexistence of element of the crime before presenting evidence establishing that element. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

5. Searches and Seizures 7(26)

Where lease to searched premises had expired by its own terms five days after defendant's nonpayment of rent and where defendant was not present at the premises when they were searched, he had no legitimate expectation of privacy in the premises and thus no standing to challenge the search.

6. Criminal Law 855(8)

Procedure to be used in investigating alleged out-of-court communications between jurors and witnesses in a criminal trial and decision whether to grant a mistrial rest in sound discretion of trial court.

7. Criminal Law 868

Trial court did not abuse its discretion in manner in which it investigated alleged out-of-court statement made by government witness and allegedly overheard by two jurors.

8. Post Office 35(7)

Intended victim need not have been actually defrauded in order for a mail fraud violation to have occurred. 18 U.S.C.A. § 1341.

9. Criminal Law 1169.1(9)

Even if heresay statement introduced to rebut a witness' deposition was inadmissible admission of the statement was

harmless error beyond a reasonable doubt since it merely rebutted contrary, irrelevant inference that could have been drawn from the desposition.

Appeal from the United States District Court for the Western District of Louisiana.

Before COLEMAN, Chief Judge, and CHARLES CLARK and REAVLEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Marion Charles Buchanan appeals his conviction on two counts of violations 18 U.S.C. § 1341. He claims the mailings involved in each count were not for the purpose of executing the admitted scheme to defraud. We find that the mailing Count I was not, but that the mailing in Count II was for this purpose, reverse his conviction in Count I, and affirm his conviction on Count II.

The evidence, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), was as follows. Count I: on or about January 31, 1978, the defendant, pursuant to a scheme to defraud his mortgagee, James E. Parkerson, tendered to Parkerson's agent an uncollectible check to obtain forbearance of foreclosure on the mortgage. The agent, John Kelly, also a vice president of First National Bank of Lafayette (" the Lafayette Bank"), initially rejected the check because of an apparent discrepancy on

the face of the check . Then, on February 10, the defendant returned to the Lafayette Bank and tendered to Kelly a corrected check drawn on an account in the defendant's name at the Merchants and Shipowners Bank in Kingstown, St. Vincent, West Indies, which account in fact did not exist. The defendant asked for a letter saying that Kelly would not foreclose on the defendant's property for sixty days, but Kelly refused. Three days later the Lafayette mailed the check to the Whitney National Bank in New Orleans for collection. Although the foreclosure proceedings were stopped on several occasions, the presentation of the bad check did not result in forbearance of the foreclosure.

Count II: on or about January 31, 1978, the defendant deposited into his corporate account at the Lafayette Bank three checks totaling $175,000, apparently certified and drawn on his personal account at the Merchants and Shipowners Bank in "Kingston [sic], St. Vincent, W.I." Ms. Marcus the teller with whom these checks were deposited, testified at trial that she gave the defendant immediate credit in his account for these checks, since they were certified and were to be treated, so she thought, as cash items. Ms. Marcus further testified, however, that the defendant did not ask for immediate credit and that he did not withdraw any money from his account at this time. One of these checks, in the amount of $50,000, was sent through ordinary processing channels to the Whitney National Bank. The check, dated January 27, 1978, was stamped on January 31, 1978, by the Whitney Nat'l Bank. Two or three days

after the deposit, the Whitney Nat'l Bank called the Lafayette Bank and said the check was being sent back because it could not be handled through ordinary banking channels. After this phone call, the defendant's account at the Lafayette Bank was frozen. On February 10, 1978, the defendant presented to a telier at the Lafayette Bank several checks drawn on his corporate account there, seeking to purchase money orders. He was not allowed to do so as his account had been frozen. On February 13, 1978, the Lafayette Bank mailed the $50,000 check back to the Whitney National Bank for collection. The next day, the defendant deposited with the Manufacturer's Hanover Bank in New York City five checks totaling $159,200, drawn on his corporate account at the Lafayette Bank. On February 15, the Lafayette Bank receivedthese checks through the Federal Re - serve System, and returned them unpaid to the Hanover Bank with the notation "drawn against uncollected funds."

[1] As to the events proved under Count I, Buchanan argues that when Kelly refused to give Buchanan the sixty-day letter he sought, the scheme failed and the subsequent mailing could not have been for the purpose of executing the scheme. We agree. Without speculating why the defendant let Kelly keep the worthless check when he was told it would not result in forbearance, we know Kelly refused to give the desired guarantee of forebearance of foreclosure. Since the scheme to obtain forbearance of foreclosure on the mortgage ended when Kelly refused to give the sixty-day letter, the mailing could not have been for the purpose of executing that scheme. United States v. *Maze*, 414 U.S. 395, 400, 94 S.Ct. 645, 648, 38 L.Ed.2d 603, 607 (1974). *Like Maze in his case, the defendant here, once*

Kelly refused to give him the sixty-day letter, probably would have preferred that the check never be mailed. The scheme as planned contemplated mailing, but the scheme as unsuccessfully put into motion did not result in a mailing for the purpose of executing the scheme, as the statute requires.

[2] In connection with Count II, Buchanan strenuously argues that he was not given immediate credit for the checks deposited in late January, and that even if he was, the mailing could not further this *successful* scheme. Buchanan's factual argument is contrary to the testimony of the teller involved, contrary to the implicit finding of the jury, and unsupported by any evidence. Buchanan was given immediate credit on January 31, 1978. Assuming this fact, he admits the scheme was successful but he claims the delay caused by the mailing could not further the scheme. This is clearly not so. The mailing would have delayed the discovery of the fraud and would have given Buchanan exactly what his schemes were designed to obtain: time to acquire funds to which he was not then entitled. The Government proved that the defendant had arranged with the Oaks Darby group, a collection of personages in New York under investigation for check kiting, for the bogus checks to take the following course: Buchanan would deposit the check with any bank, and it would be sent to the Merchants and Shipowners Bank in the West Indies. Since the check bore the notation "Payable Through Oxford Trading Establishment," it would be sent to that entity and would end up in the pocket of Harry Neal Kelly, who controlled the Oxford Trading Establishment Harry Kelly would then hold the check for a fee. This elaborate scheme would buy Buchanan as much as six months' use of the

credit obtained in the despositary bank. In light of this evidence, the jury could find that the mailing in Count II was clearly a part of the scheme to obtain time. *See United States v. Knight*, 607 F.2d 1172 (5th Cir. 1979), *United States v. Toney*, 605 F.2d 200 (5th Cir. 1979).

[3] The defendant argues in this court, as he did by a motion to dismiss in the court below, that Count II of the Indictment was defective on its face in that it failed to state the connection between the mailing and the scheme required by *United States v. Maze*. *Maze's* requirement is just that the mailing be for the purpose of executing the scheme. The indictment meets this requirement.[1] This argument is without merit.

[4] The defendant challenges the admission of the evidence regarding his contacts with the Oaks Darby group and of evidence that he had passed bogus checks on several prior occasions. This evidence was admitted under Rule 404(b) Fed.R. Evid., to show the full extent of the conspiracy and to prove

1. Paragraph2 of Count II of the indictment states in full:

> On or about February 13, 1978, in the Lafayette Division of the Western District of Louisiana, MARION CHARLES BUCHANAN, SR., for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowlingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the U.S. Postal System, from Lafayette, Louisiana, to New Orleans, Louisiana, a certified check drawn on MARION CHARLES BUCHANAN, SR.'S account, Number 291-123, Merchants and Shipowners Bank, Kingston [sic], St. Vincent, West Indies, in the amount of $50,000, under First National Bank of Lafayette collection letter, Number 22488, addressed to Whitney National Bank, New Orleans, Louisiana, all in violation of Title 18, United States Code, Section 1341 (18 U.S.C. 1341).

1. Paragraph 2 of Count II of the indictment states in full:

intent. The defendant argues that since he never made intent an issue, the evidence was not admissible to prove intent. We disagree. Faced with a plea of not guilty, the prosecution is under no obligation to wait and see whether the defendant argues the non-existence of an element of crime before the prosecution presents evidence establishing that element.

[5] Buchanan sought to suppress evidence he contends was fruit of an unlawful, warrantless search that took place on May 15, 1979. On April 15, Buchanan had failed to pay the monthly rent for the searched premises. The lease expired by its own terms five days after the non-payment of rent. On May 5, 1979, the landlord changed the locks on the doors of the premises. Since Buchanan had no further property interest in the premises once the lease had expired, and since he was not present at the premises when they were searched, he had no legitimate expectation of privacy in the premises and thus no standing to challenge the search. *Rawlings v. Kentucky*, – U.S. – , 100 S.Ct. 2556, 65 L. Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The defendant next claims he should have been granted mistrial. On the morning of August 15, 1979, the deputy clerk of the court, Cheryl Curtis, told the district judge that she had overheard a comment made out of court by a government witness to the effect that the defendant would be "burned" by the witness' testimony. Ms. Curtis said the comments were made

on August 14 in an elevator and that two jurors were in the elevator at the time. Judge Davis met with the attorneys in chambers and thoroughly investigated the matter. In open court, Judge Davis asked the jury if any of them had heard any remarks regarding the trial the previous day. Two jurors re - sponded that they had overheard something. Judge Davis then questioned these jurors separately, in chambers, with only the court reporter and the judge's law clerk present. Both jurors described the comment they overheard as "Tomorrow we are going to wrap up this case." These were not the jurors on the elevator. Judge Davis then further investigated the matter and concluded that Ms. Curtis had been mistaken about the presence of jurors on the elevator. Apparently there was another government witness on the elevator who resembled a juror. Judge Davis then denied the defense motion for a mistrial.

[6,7] We recognize the seriousness of out–of–court communications between jurors and witnesses. Here, the trial judge after careful investigation determined that no such forbidden communication occurred. The procedure to be used in investigating such an alleged occurence and the decision whether to grant a mistrial rest on the sound discretion of the trial court. *United States v. Martinez*, 604F.2d 361, 364 (5th Cir. 1979); *United States v. Burke*, 496 F.2d 373, 377 (5th Cir. 1974); *Tillman v. United States*, 406 F.2d 930, 937-938 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). There was no abuse of discretion here.

[8,9] Finally, Buchanan challenges the admission of a heresay statement allegedly made by Mr. Parkerson, which the Government introduced to rebut Mr. Parkerson's deposition The deposition, introduced by Buchanan, contained the statement that Parkerson had not been defrauded by Buchanan. That statement was irrelevant. The intended victim need not have been actually defrauded in order for a mail fraud violation to have occurred. *United States v. Shaffer,* 599 F.2d 678, 679 (5th Cir. 1979). Even if the statement[2] was inadmissible [see Fed.R. Evid. 803(3)], we conclude it was harmless error beyond a reasonable doubt since it merely rebuts the contrary, irrelevant inference that could be drawn from Parkerson's deposition, to wit, that he did not want Buchanan prosecuted.

The judgment of conviction on Count I is reversed; the judgment of conviction on Count II is affirmed. The case is remanded to the district court with directions to vacate the sentence on Count I.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

2. The statement was: "If he is a crook or a thief, he should be prosecuted and I will not stand in the way."

IN THE UNITED STATED COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5671

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARION CHARLES BUCHANAN, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITIONS FOR REHEARING

(January 21, 1981)

Before COLEMAN, Chief Judge, CLARK and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/S/_____
United States Circuit Judge

IN THE UNITED STATED COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5671

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARION CHARLES BUCHANAN, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

ORDER:

( ) The motion of _____
for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

(XX) The motion Appellant, Marion Charles Buchanan, Sr.
for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including February 20, 1981, the stay to continue in force until the

final disposition of the case by the Suprene Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____
for a further stay of issuance of the mandate GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Charles Clark
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5671

D.C. Docket No. CR79-60003-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARION CHARLES BUCHANAN, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

Before COLEMAN, Chief Judge, CHARLES CLARK and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

December 22, 1980

ISSUED AS MANDATE: